No. 88-979

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all others similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Petitioners.

VS.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DEPERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI and VICTOR OLIVADOTTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE", the names being fictitious but intending but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Is the federal court authorized to enforce the fiduciary duties of Trustees of multi-employer pension plans when a clear breach of such duties created a structurally defective merger between two plans, to the detriment of thousands of participants in their pension benefits, in direct violation of federal policy and the Labor Management Relations Act § 302(c)(5), 29 U.S.C. § 186(c)(5)?

2. Does the signing of an Agreement in 1973, prior to the effective date of ERISA on January 1, 1975, which by its terms was not effective until December of 1976, preclude application of ERISA standards when all significant conduct at issue occurred after the effective date of ERISA?

3. Upon partial termination of the Brewery Fund, does the term "to the extent funded," I.R.C. § 411(d)(3), apply solely to the assets of the partially terminated fund, which were completely inadequate and insufficient to make the necessary payments, and do the Trustees of the Teamsters Fund, upon subsequent merger without any authority in plan documentation, breach their fiduciary responsibility by diverting Teamster assets to pay such brewery retirees benefits?

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JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was dated and entered on August 12, 1988. On November 1, 1988, Justice Marshall signed an order extending time for filing this petition for certiorari to and including December 12, 1988. The jurisdiction of this Court is invoked under 29 U.S.C. § 186, 29 U.S.C. § 1001 *et seq.* and 28 U.S.C. § 1331.

STATEMENT OF THE CASE

In August 1973, the Trustees of the New York State Conference Pension and Retirement Fund (Trustees) and of the Brewery Fund entered into an agreement to merge the Brewery Fund into the Teamsters Fund.[1] The Merger Agreement was expressly conditioned upon receipt of a tax ruling by the IRS qualifying the merger for favorable tax treatment. The merger was to be effective 30 days after receipt of IRS approval. The IRS issued two tax rulings. The first was IRS approval to the merger issued in November of 1976. The second tax ruling held the Brewery Workers Pension Plan had suffered a partial termination between "January 1, 1976 and September 30, 1976, and before the December 1976 date on which the court said the two plans were fully integrated."

In 1974, while still awaiting Internal Revenue Service approval, the Trustees voted not to proceed with the merger. Litigation was commenced by the Brewery Workers Trust Fund to consummate the transaction. The New York courts interpreting only the signed documents, held the merger effective as of December 1, 1976. Numerous federal and state actions ensued of which petitioners were not parties.

When the New York State courts declared the merger effective, the Fund's actuarial advisers then submitted to the Trustees that two courses of action were open to them — either a reduction of 33.9% across-the-board reduction of future benefits or

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[1] The Teamsters Fund, in existence since the mid-1950's, established a qualified, multiemployer defined benefit pension plan pursuant to § 302(c)(5) of the LMRA. As of December 31, 1972, the plan had 25,671 active participants, 1,249 pensioners and net assets of $90,900,736. The Brewery Fund, in existence from June 1967 to December 1, 1976, established a separate multiemployer pension plan. As of December 31, 1972, the Brewery Fund had 5,156 active participants, 2,206 pensioners and net assets of $21,249,940. By September 30, 1976, the Brewery Fund's active participants fell by 73% and employer contributions decreased by 61%. However, the number of pensioners increased by 54% and the amount of pension payments went from $4,158,338 to $8,324,844. The Brewery Fund was insolvent prior to the effective date of the merger on December 1, 1976.

plan termination. Rather than follow this advice, the Trustees have taken from contributions of the Teamster employers, some $7 million per year and transferred that sum to pay retirement benefits of brewery workers who had retired prior to the effective date of the merger.

Petitioners commenced this action in District Court seeking declaratory and injunctive relief claiming that the Trustees breached their fiduciary duties to the Teamsters Fund in violation of Labor Management Relations Act (LMRA) § 302(c)(5), § 186(c)(5) and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq*. The Trustees further breached their responsibilities by the admitted failure to investigate the soundness of the Brewery Fund prior to signing the Merger Agreement, by not terminating the insolvent Fund or reducing future benefits as recommended by the plan consultants, and created a structural violation by paying Teamster Fund assets to retired Brewery Fund pensioners whose retirement antedated the merger.

The district court rejected these arguments and granted summary judgment to the Trustees. The district court held in effect, that the Trustees could not be held in breach of their fiduciary duty when they were following the mandates of the state court.

In all of the litigation that ensued, the Trustees never raised the issue of ERISA. Such an omission was explicitly commented upon by the Appellate Division, Second Department in *Brewery Workers v. N.Y.S. Teamsters Conference Pension and Retirement Fund*, 62 A.D.2d 1046 (2d Dept. 1978), *leave to appeal denied*, 45 N.Y.2d 706 (1978). The court stated:

> "The original judgment and order was entered almost four months after the effective date of ERISA. Certainly defendants (Teamster Trustees) could have raised the ERISA defenses prior to its entry but inexplicably failed to do so."

On appeal, the Second Circuit ignored the claim of breach of fiduciary duty and consequent structural violation regarding

the Merger Agreement, under the LMRA. Instead, the Court found that ERISA did not apply to the Merger Agreement.

Furthermore, the court ruled that the payments commencing post December 1, 1976 and continuing to the present, by the Trustees to the Brewery Plan beneficiaries who had retired prior to December 1, 1976, were not enjoinable. According to the Second Circuit, these payments were the result of pre-ERISA acts. Petitioners contend that these continuing payments stand by themselves occurring after ERISA's effective date and therefore fall within the fiduciary responsibilities in 29 U.S.C. § 1104.

Moreover, the Court rejected the claim that there existed a fiduciary duty on the part of the Trustees to stop paying benefits to Brewery Fund beneficiaries once the assets of the Brewery Fund were exhausted. According to the Second Circuit, under Internal Revenue Code (I.R.C.) § 411(d)(3), funding to the extent of assets was to be measured by both the assets of the Brewery Fund and the Teamster Fund. This Circuit's holding ignored the merger's effective date of at least two months after the partial termination and directly contravenes the applicable statute, 26 U.S.C. § 411(d)(3).

Furthermore, the appellate court erred in ruling that the Trustees' use of Teamster Fund assets of $7,000,000 annually to pay benefits to Brewery Fund beneficiaries did not violate § 302(c)(5) of the LMRA. The court characterized such payments as a "single breach of fiduciary duty in the administration of a pension fund" not actionable under § 186(c)(5). Additionally, the court ruled the acts complained of did not constitute a "structural defect" under LMRA.

SUMMARY OF ARGUMENT

In 1982, this Court decided *United Mine Workers, etc. v. Robinson*, 455 U.S. 562 (1982), and explicitly left open the question of enforcement of fiduciary duties under the LMRA by the federal courts. The Court stated:

> "12. In *NLRB v. Amax Coal Co., supra* at 330, 101 S. Ct. at 2794, the Court held that in enacting § 302(c)(5) 'Congress intended to impose on Trustees traditional fiduciary duties.' The Court did not decide, nor do we decide today, whether federal courts sitting as courts of equity, are authorized to enforce these duties."

455 U.S. at 573, n. 12.

This case involves pension Trustees who have disregarded their fiduciary duties. They have placed the pension fund in their care at great risk and have seriously jeopardized benefits of thousands of plan participants. This failure began when the Trustees agreed to a merger with a financially ailing fund from a financially ailing industry without any attempt to investigate the soundness of the other plan. Their breach continues as they persist in diverting $7 million annually from employer contributions to support pensioners of other employers when other prudent alternatives are available. The Trustees have disregarded their duty to preserve the financial security of the fund.

Petitioners assert that a scheme whereby employer contributions are diverted to pay benefits to retirees of other employers who never made contributions to the plan and whose employees were never participants in the plan, is a breach of fiduciary duty. The end result is a substantial injustice which violates § 302(c)(5) of the LMRA and federal policy and should be enjoined by the federal courts.

As this Court stated in *N.L.R.B. v. Amax Coal Co.*,

> Senator Ball stated that "all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; . . ."

453 U.S. at 331 (1981).

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

A. *The failure of the Trustees to investigate the propriety of a merger that threatens the Fund's soundness is a structural violation of § 186(c)(5) of the LMRA when the ultimate effect is that the trust is not operated for the sole and exclusive benefit of the employees as § 186(c)(5) requires.*

The Trustees signed an agreement to merge the Teamsters Fund with the Brewery Fund without investigating the financial soundness of the Fund, the soundness of its contributing employers or the outlook for the relevant industry. Such failure, when relevant information was readily available, breaches the fiduciary duties under § 302(c)(5) of the LMRA. In the case at bar, this violation of duty has resulted in substantial financial harm to the Teamsters Fund.

Section § 302(c)(5) imposes on Trustees traditional fiduciary duties. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). Trustees are held to high standards under the LMRA. *Hurn v. Retirement Fund Trust, Etc. of So. Calif.*, 703 F.2d 386 (9th Cir. 1983). A pension plan trustee has the fiduciary duty to preserve the financial security of the Fund and apply the Fund's assets for the benefit of employees to the greatest extent possible. *Adams v. N.J. Brewery Emp. Pen. Trust Fund, Etc.*, 670 F.2d 387 (3d Cir. 1982).

No justification has ever been offered by the Trustees why they did not conduct any type of investigation, request their Fund consultants to make an inquiry or recommendation or even to receive up-to-date actuarial valuations on the Brewery Fund. Similarly, there is no evidence that legal counsel was ever consulted before signing the Agreement.

The Trustees failed to observe their duty to seek outside assistance which resulted in a merger that was not in the best interest of the Teamster Fund. Moreover, this merger has resulted in a trust that is in contravention of the express statutory

language of 29 U.S.C. § 186(c)(5) structural requirement that funds are for the sole and exclusive benefit of the employees of such employers who contribute to the fund.[2]

The Second Circuit has overlooked its own recent case in *Local 50, Bakery and Confect. v. Local 3, Bakery*, wherein the Circuit states, quoting Senator Ball,

> [A]ll [section 302] really does is to protect the rights of employees to benefits out of these funds which are created by their own labor.

733 F.2d at 235.

The refusal to grant injunctive relief violates the very precept of § 302(c)(5). Notwithstanding the Second Circuit's "narrow view" of structural violations and its preferred analysis on a "case by case" basis, it summarily dismissed the claim.

B. *The application of ERISA is proper when the significant conduct at issue occurs after the statute's effective date.*

The Second Circuit's rejection of petitioners' jurisdictional argument that the Trustees' use of Teamster Fund assets to pay benefits to Brewery Plan beneficiaries is actionable under ERISA, constitutes an unwarranted superficial treatment of the issue. The court, in effect, advances the theory that one can be shielded from ERISA if even insignificant acts occurred prior to January 1, 1975. 29 U.S.C. § 1144.

The Merger Agreement was signed in 1973. The IRS ruled that there was a partial termination of the Brewery Plan as of September 30, 1976. The Merger Agreement became effective

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[2] The Brewery Fund was operating at a loss. As of December 1, 1976, the Brewery Fund had approximately $17,300,000 in assets and owed vested benefits of approximately $77,500,000. In 1978, the aggregate annual amount of employer contributions to the Brewery Fund had fallen more than $7,500,000 below the aggregate pension payments to the Brewery Fund pensioners. Presently, the Trustees are diverting $7,500,000 annually from employer contributions for the Teamsters and paying benefits to the terminated Brewery pensioners.

on December 1, 1976 and the Trustees commenced paying Teamster Fund assets to Brewery Plan beneficiaries post December 1, 1976. The petitioners contend that such payments are actionable under ERISA because the critical acts which give rise to the claim occurred after December 1, 1976 and are still occurring. A party cannot rely on pre-ERISA conduct to escape the application of ERISA after ERISA went into effect. *Coward v. Colgate-Palmolive Co.*, 686 F.2d 1230 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983).

Moreover, the court rejected the "continuing breach" theory advanced by petitioners. Petitioners contend that every payment by the Trustees to the brewery retirees, retiring before December 1, 1976, constitutes a fresh breach of fiduciary duty that is actionable under ERISA. *Union Asphalt and Roadoils, Inc. v. Mo-Kan Teamsters Pension Fund*, 857 F.2d 1230 (8th Cir. 1988).

The practical import of Congress restricting ERISA to post January 1, 1975 acts is to prevent fiduciaries' past conduct from being judged retroactively under the Act's standards. *Quinn v. Country Club Soda Co., Inc.* 639 F.2d 838 (1st Cir. 1981).

Courts have rejected the "continuing breach" theory when it involves the nonperformance of an Act. *Martin v. Bankers Trust Co.*, 565 F.2d 1276 (4th Cir. 1977). However, in the instant case, we are dealing with affirmative action on the part of the Trustees. By provincially pegging such actions as pre-ERISA, the Second Circuit shields the Trustees from inquiry under ERISA. This is contrary to ERISA's goals of safeguarding participants and holding fiduciaries responsible for breach of duty.

C. *The Teamsters Fund should not be liable for benefits to Brewery Fund retirees whose retirement antedated the effective date of the merger.*

The Internal Revenue Service ruling provided that "a partial termination of the Brewery Workers Pension Fund occurred between January 1, 1976 and September 30, 1976, and before the December 1, 1976 date on which the court said the two plans were fully integrated. . ." The I.R.S. further provided that this

partial termination had no effect on the termination of the Brewery Workers Fund "due to the fact participants were fully vested in their accrued benefits to the extent funded, at the time of the partial termination."

Examining this from the brewery workers point of view, some time between January and September 1976, the retirees subject to the partial termination vested in all of the assets of the Brewery Workers Fund. These assets were totally inadequate to pay the cost of their retirement. Only the discretionary power of PBGC or collection from the employers pursuant to ERISA, provided a fund to make up the difference between the Fund assets and the amount needed to properly underwrite the rest of their retirement benefits. This state of facts continued through October and November of 1976.

On December 1, 1976, a merger took place between the Brewery Fund and the Teamsters Fund. Suddenly there appeared, based upon teamster assets, the financial means to pay antecedent brewery retirees benefits.

From the teamsters point of view, theirs was a perfectly solvent trust fund whose contributions were being used to provide retirement benefits. Contributing employers had labor contracts with the teamster unions and the fund was solvent. On December 1, 1976, the Teamsters Fund was suddenly saddled with an obligation to pay retirement benefits to brewery workers who retired prior to December 1, 1976. The brewery employers never contributed to a teamster fund and had never been parties to a collective bargaining agreement with the teamsters. By virtue of the merger, the $7 million per year of teamster employer contributions, which constitute the wages of teamsters, are being used to pay pre-December 1, 1976 retirees of the brewery workers.

This shifting of obligation which was solely that of the brewery employers and/or discretionary with the PBGC, is legitimized by the holding of the Second Circuit. The Internal Revenue Service clearly provided that benefits vested only to the extent of assets in existence at the time of the partial termination. The

Second Circuit in effect has held that the term "assets" includes assets of the brewery workers and assets of the teamsters. Finding that the term includes assets of both funds, the Second Circuit refuses to enjoin the payments from teamster assets to brewery retirees. The Second Circuit stated that "we are convinced that possible underfunding of the merged plan does not place the trustees under a fiduciary obligation to cease payments to Brewery Fund beneficiaries."

The petition for certiorari on this point involves the interpretation of I.R.C. § 411(d)(3) which is carried over to the fiduciary responsibilities of the Trustees. Petitioners urge upon the Court that the assets upon partial termination are the only assets which may be used to pay brewery workers pension obligations pre-December 1, 1976. It is contended that to use teamster assets to fund pre-December 1, 1976 retirees of the Brewery Fund is not only a breach of fiduciary obligation, but creates a § 302(c)(5) structural violation.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New City, New York
December 5, 1988

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1168 August Term, 1987

(Argued May 19, 1988 Decided August 12, 1988)

Docket No. 88-7126

THOMAS J. BAUM, JOHN J. O'NEILL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all others similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Plaintiffs-Appellants,

v.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DePERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI and VICTOR OLIVADOTTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE", the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint,

Defendants-Appellees.

Before: LUMBARD, MESKILL and WINTER, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Northern District of New York, McAvoy, *J.*, granting summary judgment for defendant trustees on plaintiffs' claims of breach of duty under ERISA.

We hold that acts occurring before the effective date of ERISA are not actionable under the ERISA standard of fiduciary care even if the acts give rise to consequences after ERISA's effective date. We also hold that the "partial termination" of the pension plan within meaning of I.R.C. § 411(d)(3) did not impose on plan trustees a fiduciary obligation to terminate the plan itself.

Affirmed.

DAVID W. SILVERMAN, New City, New York (Granik, Silverman, Sandberg, Campbell & Nowicki, New York, New York, of counsel), *for Plaintiffs-Appellants*.

JOSEPH E. KOLICK, JR., Washington, D.C. (Robert J. Higgins, Dickstein, Shapiro & Morin, Washington, D.C., Richard N. Aswad, Aswad & Ingraham, Binghamton, New York, of counsel), *for Defendants-Appellees*.

MESKILL, *Circuit Judge*:

In this appeal, we are called upon to decide whether the United States District Court for the Northern District of New York, McAvoy, *J.*, correctly granted summary judgment for the defendants, Trustees of the New York State Teamsters Conference Pension and Retirement Fund (the Teamsters Fund), a multi-employer pension fund, on claims that they committed breaches of fiduciary duty actionable under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. § 1001 *et seq.* (West 1985 & Supp. 1988). The plaintiffs-appellants are Teamster participants in the Teamsters Fund (the Participants). According

to the Participants' complaint, the defendants-appellees Trustees of the Teamsters Fund (the Trustees) breached their fiduciary duty in 1973 when they agreed to merge the Teamsters Fund with the Brewery Workers Pension Fund (the Brewery Fund) without making adequate inquiry into the financial soundness of the Brewery Fund. The Participants also contend that the Trustees have a fiduciary obligation to cease making payments to Brewery Fund beneficiaries and to terminate or segregate the Brewery Fund from the Teamsters Fund because the former underwent a "partial termination" in 1976, before the merger was finally consummated. The Participants argue that these actions are subject to the fiduciary duty provisions of ERISA. On appeal, they add that the declaratory and injunctive relief they seek is appropriate even though New York state courts have ordered the Trustees to comply with the merger agreement and pay benefits to beneficiaries of the Brewery Fund.

The Trustees moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. The district court converted the Trustees' motion to one for summary judgment under Fed. R. Civ. P. 56, *see* Fed. R. Civ. P. 12(b), and dismissed the Participants' complaint. The Participants appeal. For the reasons that follow, we affirm.

BACKGROUND

The facts underlying the instant litigation are not in dispute. In August 1973, the Brewery Fund and the Teamsters Fund entered into an agreement to merge. Shortly thereafter, however, one of the largest breweries in the New York area announced that it would shut down. Faced with the loss of a significant portion of brewery employer contributions without a corresponding reduction in pension benefit liability to Brewery Fund beneficiaries, the Teamsters Fund repudiated the agreement in February 1974. The Brewery Fund sued in New York Supreme Court to compel specific performance. The Supreme Court held that under New York law, "chang[ed] economic conditions" did not excuse performance of the merger agreement. *See* J. App. 201-02. The court therefore granted summary judgment for the Brewery Fund, holding that the agreement was valid, binding

and enforceable, and ordering specific performance on the part of the Teamsters Fund. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, No. 9997/74 (N.Y. Sup. Ct. Apr. 11, 1975), *aff'd mem.*, 49 A.D.2d 755, 374 N.Y.S.2d 590 (2d Dep't 1975), *leave to appeal denied*, 38 N.Y.2d 709, 382 N.Y.S.2d 1028, 346 N.E.2d 558 (1976).

The merger agreement was conditioned on the Teamsters Fund obtaining a favorable determination from the Internal Revenue Service (IRS) on the tax qualification of the merged plan. In September 1976, the IRS District Director issued such a determination. *See* J. App. 208-09. Despite having obtained this ruling, the Teamsters Fund still did not go through with the merger. The Brewery Fund therefore moved for enforcement of the original New York Supreme Court decision. In an Order and Supplemental Judgment dated April 12, 1977, the Supreme Court granted the motion. The court declared the merger to be complete as of December 1, 1976, and held that all members of the Brewery Fund had become members of the Teamsters Fund as of the same date. In sweeping and unambiguous language, the court also directed the Teamsters Fund and its Trustees to

> (a) accept all the assets and property of the [Brewery Fund] . . .; (b) assume and pay all legal and proper obligations of the [Brewery Fund]; (c) pay all benefits due to: covered members already retired under the [Brewery Fund]; members in receipt of disability benefits; beneficiaries entitled to receive benefits under the [Brewery Fund]; and former members with vested rights not yet receiving benefits, but who become entitled to receive benefits in the future . . . .

J. App. 205-06. The court also ordered that Brewery Fund assets be transferred to the Teamsters Fund. *Id.* at 206. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, No. 9997/74 (N.Y. Sup. Ct. Apr. 12, 1977), *aff'd*, 62 A.D.2d 1046, 404 N.Y.S.2d 158 (2d Dep't), *motion for leave to appeal dismissed*, 45 N.Y.2d 706, 408 N.Y.S.2d 1025, 380 N.E.2d 338 (1978).

In addition to resisting the Brewery Fund's efforts to force specific performance of the merger agreement, the Teamsters Fund took affirmative steps to avoid the agreement. The Teamsters Fund asked the Pension Benefit Guaranty Corporation (PBGC) to disapprove the merger under ERISA. The PBGC refused to do so, however. The District of Columbia Court of Appeals agreed with the PBGC that ERISA did not apply to the merger agreement because its "execution and repudiation . . . occurred prior to the [January 1, 1975] effective date of ERISA." *New York State Teamsters Conference Pension and Retirement Fund* v. *Pension Benefit Guaranty Corp.*, 591 F.2d 953, 957 (D.C. Cir.) (Lumbard, *J.*, sitting by designation), *cert. denied*, 444 U.S. 829 (1979).

The Teamsters Fund also sought to have the United States Tax Court revoke the IRS District Director's favorable 1976 determination with respect to the tax qualification of the merged plan. We affirmed the tax court's conclusion that it lacked jurisdiction to grant the requested relief. *Wenzel* v. *Commissioner of Internal Revenue*, 707 F.2d 694, 696 (2d Cir. 1983).

Finally, the Trustees in 1983 asked the IRS for technical advice. They sought a finding that the Brewery Fund had lost its tax qualified status before the merger. Such a finding would vitiate a condition precedent to the merger and allow them to avoid it. The IRS District Director rejected this contention, however, in a determination letter issued in February 1985 and based on a detailed Technical Advice Memorandum issued by the Distric Director's Brooklyn Key District Office, *see* J. App. 38-47. The letter stated that a "partial termination" of the Brewery Fund had occurred before the merger was consummated in 1976, but that this event did not affect the Brewery Fund's tax qualification. *See id.* at 48-49

In 1977, employees covered by the former Teamsters Fund sued both funds to enjoin the merger. The district court dismissed the complaint, however, holding that plaintiffs' allegations of ERISA violations failed to state a claim. *Cicatello* v. *Brewery Workers Pension Fund*, 434 F.Supp. 950, 958 (W.D.N.Y. 1977), *aff'd mem.*, 578 F.2d 1366 (2d Cir. 1978).

Against this background, the Participants commenced the instant lawsuit. They asserted federal jurisdiction under ERISA, claiming that the defendant Trustees had breached and were continuing to breach their fiduciary responsibilities. The Participants identified three interrelated but purportedly distinct breaches of duty. First, they contended that the Trustees had failed to make proper inquiries into the financial soundness of the Brewery Fund before entering into the agreement to merge in 1973. Second, they contended that the Trustees were dissipating Teamsters Fund assets to pay Brewery Fund benefits, an action rendered improper by the underlying impropriety of the merger agreement itself. Third, they contended that the Trustees had an affirmative duty to terminate the Brewery Fund or segregate it from the Teamsters Fund because the "partial termination" caused a portion of the Brewery Fund to "spin off" or go out of existence.[1]

The district court rejected all of these contentions and dismissed the complaint. The Participants now appeal, repeating their contentions below and adding the argument that the decisions of the New York state courts do not shield the Trustees' actions because ERISA preempts state law.[2]

DISCUSSION

A. *Breach of Fiduciary Duty: 1973 Merger Agreement*

The core of the Participants' argument is the contention that the Trustees agreed to the merger in 1973 without making sufficient inquiry into the financial condition of the Brewery Fund. The Participants argue that this failure and its consequences are actionable under ERISA.

We disagree. It is true that ERISA establishes a statutory standard of care for pension plan fiduciaries. *See* 29 U.S.C. § 1104 (1982). But even if the alleged failure to inquire fell below that standard, it is not by itself actionable under ERISA because it occurred before January 1, 1975, the date ERISA became effective. *See* 29 U.S.C. § 1144(b)(1) (1982); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 499 n.1 (1978). *Cf. New York State Teamsters Conference Pension Fund*, 591 F.2d at 957 (no federal

jurisdiction under pension benefit insurance provisions of ERISA because execution and repudiation of merger agreement between Brewery Fund and Teamsters Fund occurred before effective date of ERISA).

The Participants nevertheless contend that the initial breach of fiduciary duty in entering into the merger agreement is still actionable under ERISA because it taints subsequent and current payments of benefits to brewery workers pursuant to the agreement. We are not persuaded, however, that this "continuing breach" analysis brings the Participants' breach of duty claim within the coverage of ERISA. Section 1144(b)(1) expressly provides that ERISA does not supersede state law "with respect to . . . any act or omission which occurred[] before January 1, 1975." Courts have uniformly rejected the theory that pre-ERISA acts are actionable under ERISA if they generate consequences after ERISA's effective date. *See Menhorn* v. *Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501-02 (9th Cir. 1984); *Freeman* v. *Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656-57 (9th Cir. 1983); *Coward* v. *Colgate-Palmolive Co.*, 686 F.2d 1230, 1233-34 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Quinn* v. *Country Club Soda Co.*, 639 F.2d 838, 840-41 (1st Cir. 1981); *Martin* v. *Bankers Trust Co.*, 565 F.2d 1276, 1278-79 (4th Cir. 1977). Participants' theory "would read . . . section [1144](b)(1) out of the statute," *id.* at 1279; *accord Coward*, 686 F.2d at 1234. Accordingly, we hold that ERISA does not cover the Participants' claims based on either the alleged breach of fiduciary duty in entering into the 1973 merger agreement or the subsequent payment of benefits to brewery workers pursuant to the merged plan.

In light of this conclusion, we may summarily dispose of the Participants' argument that the judgments of the New York courts are preempted by ERISA. First, this argument was not raised below. Second, the argument is without merit. To the extent that the Participants base their allegations of breach of duty on the Trustees' conduct prior to execution of the merger agreement and the purportedly tainted consequences of that decision, their claim is not subject to ERISA. Accordingly, the state courts were free to apply state law, *see* 29 U.S.C. § 1144(a), (b)(1),

and their judgments are not subject to collateral attack on preemption grounds.

B. *Breach of Fiduciary Duty: Terminating the Brewery Fund*

The Participants also base their claim that the Trustees breached their fiduciary duty on a theory grounded in provisions of ERISA and the Internal Revenue Code (I.R.C.), independent of the 1973 agreement and the circumstances of its execution. According to this theory, the 1976 "partial termination" of the Brewery Fund limits the benefits available to Brewery Fund beneficiaries to the assets in the Brewery Fund at that time. Therefore, the Participants contend, the Trustees are obliged to pay benefits to Brewery Fund beneficiaries only until Brewery Fund assets are exhausted. Moreover, the Participants argue, the Trustees have an affirmative *duty* to spend no more than the Brewery Fund's assets, and a concomitant duty, once those assets are exhausted, to terminate the Brewery Fund outright or to segregate it from the Teamsters Fund. The Participants conclude that they are entitled to relief because the Trustees have failed to perform these purported duties.

As an initial matter, the orders of the New York state courts place a significant obstacle in the Participants' path. We have just held that ERISA does not preempt those orders with respect to the merger agreement and its consequences. The Trustees are therefore subject to valid state decisions that compel them, in no uncertain terms, to merge the two funds into one and to pay benefits to Brewery Fund beneficiaries as they come due. The Participants cite no authority, and our research discloses none, to support the remarkable notion that fiduciary duty can require deliberate disobedience of a valid judicial order. On the contrary, it is more likely that obedience to such orders *insulates* a fiduciary from claims of breach of duty. *See* III A. Scott, *The Law of Trusts* § 259, at 2217 (3d ed. 1967 & Supp. 1985).

Even if the Participants could overcome the force of the state courts' judgments, the "partial termination" of the Brewery Fund does not translate into a fiduciary duty to act as they urge. Under the Internal Revenue Code, pension plans qualify for favorable tax treatment if they are structured as the Code dictates. *See*

generally 26 U.S.C.A. § 401 (West 1978 & Supp. 1988). Among these structural criteria is a requirement that a pension plan must provide that participating employees' accrued rights become non-forfeitable, or vest, upon termination or partial termination of the plan. 26 U.S.C.A. § 411(d)(3) (West 1978 & Supp. 1988). The plan must also provide that in the event of full or partial termination, accrued rights vest "to the extent funded." *Id.* The Participants contend that the 1976 partial termination of the Brewery Fund, as found in the 1985 IRS Determination Letter, *see* J. App. 48, and Technical Advice Memorandum, *see id.* at 44, means that the interests of brewery workers vested in 1976 *only* "to the extent funded" according to section 411(d)(3). The Participants conclude that the Trustees therefore have a fiduciary obligation to terminate the Brewery Fund or segregate it from the Teamsters Fund so that benefits are paid to beneficiaries of the former only to the extent it was funded in 1976.

This argument is without merit. A "partial termination" within the meaning of section 411(d)(3) is primarily a tax event. It may occur where a significant number of employees are excluded from a plan or where, as here, there is a significant reduction in employer contributions. *See* Treas. Reg. § 1.401-6(b)(2) (1988); *see also Weil* v. *Retirement Plan Administrative Committee for the Terson Co.*, 750 F.2d 10, 13 (2d Cir. 1984). Section 411(d)(3) requires that tax qualified plans make certain provisions for vesting of accrued benefits in the event of a partial termination. ERISA requires the plan administrator to report a partial termination to the PBGC. *See* 29 U.S.C. § 1343(a) (1982). Thus, a plan's treatment of partial termination has consequences for its tax status and partial termination is itself a reportable event under ERISA. But partial termination does not mean that the plan itself goes out of existence. ERISA makes absolutely clear that partial termination "does not, by itself, constitute or require a termination *of a plan*." 29 U.S.C. § 1343(b)(4) (1982) (emphasis added). *See also Chait* v. *Bernstein*, 835 F.2d 1017, 1020-21 (3d Cir. 1988); *United Steelworkers* v. *Harris & Sons Steel Co.*, 706 F.2d 1289, 1300 (3d Cir. 1983). Rather, partial termination of a plan that contains the provisions required by section 411(d)(3) accelerates vesting of accrued pension

benefits. Moreover, partial termination for tax purposes does not cause a corresponding portion of the plan to be spun off or terminated. *See Harris & Sons Steel*, 706 F.2d at 1300.

Because partial termination within the meaning of section 411(d)(3) does not alone result in a pension plan's partial extinction, then it naturally follows that the trustees of a plan are under no fiduciary obligation to extinguish a portion of the plan under such circumstances. Accordingly, we reject the Petitioners' argument that the Teamsters Fund Trustees have breached any fiduciary obligation in failing to terminate or segregate the Brewery Fund in response to the IRS' finding of partial termination.

Finally, the Participants contend that the Trustees have a fiduciary duty to stop paying benefits to Brewery Fund beneficiaries once the assets of the Brewery Fund are exhausted. This contention also rests on section 411(d)(3), under which a pension plan must provide that employees' accrued pension rights vest "to the extent funded" upon partial termination. The Participants conclude that this provision means that accrued rights vest *only* to the extent funded, and that it is therefore improper to pay benefits in excess of the assets in the partially terminated Brewery Fund. *Cf. Weil*, 750 F.2d at 13 (citing section 411(d)(3) and noting that parties claiming benefits under partially terminated fund "must demonstrate funding of the benefits they seek").

The meaning of the term "funded" is far from clear, however. It is an actuarial term of art. As the IRS' 1985 Technical Advice Memorandum notes, a qualified plan must be "funded," but

> failure to fund *at a particular level* does not disqualify a plan. Minimum funding requirements for qualified plans are provided in [I.R.C.] section 412, not in the qualification provisions of the Code, and failure to meet those minimum funding requirements results in imposition of an excess tax on the employers under [I.R.C.] section 4971, not loss of plan qualification. (See *Anthes* v. *Commissioner*, 81 T.C. 1 (1983), [*aff'd mem.*, 740 F.2d 953 (1st Cir. 1984)).]

J. App. 46 (emphasis added). It therefore appears that underfunding of a plan, without more, affects only the tax treatment of the plan and of contributions to it.

We need not delve further into the actuarial minutiae of pension plan funding and taxation, however, to resolve the question of fiduciary duty presented by this appeal. We are convinced that possible underfunding of the merged plan does not place the Trustees under a *fiduciary obligation* to cease payments to Brewery Fund beneficiaries. Indeed, by virtue of the orders of the New York courts, the Brewery Fund has been fully merged into the Teamsters Fund and the Trustees have a fiduciary relationship to the beneficiaries of the Brewery Fund as well as to the Participants. We are not persuaded that under these circumstances ERISA or the Internal Revenue Code compel the Trustees to prefer one group of beneficiaries over the other.

CONCLUSION

For the foregoing reasons, we affirm the district court's dismissal of the Participants' complaint. In light of this disposition, we do not reach the Participants' claim for injunctive relief.

FOOTNOTES

[1] The Participants did not allege any pendent state law claim for breach of fiduciary duty based on the actions of the Trustees' predecessors before January 1, 1975.

[2] The Participants also contended below and maintain here that the Trustees' conduct violates the Labor Management Relations Act of 1947 (LMRA). The Participants rely on 29 U.S.C. § 186 (1982 & Supp. IV 1986), which proscribes payments by employers to employees, employee representatives or labor organizations. *See* 29 U.S.C. § 186(a). The purpose of this proscription is "to protect the collective bargaining process by eliminating the corruptive influence of side payments by employers to union representatives." *See Haley* v. *Palatnik*, 509 F.2d 1038, 1040 (2d Cir. 1975). The statute also provides an exception for payments by an employer to trust fund pension plans "for the sole and exclusive benefit of the employees of such employer." *See* 29 U.S.C. § 186(c)(5). The Participants argue that the Trustees' use of Teamsters Fund assets to pay benefits to Brewery Fund beneficiaries constitutes a "structural" violation of this provision in the sense that the assets of the Teamsters Fund are not being used "for the sole and exclusive benefit of the employees" as section 186(c)(5) requires.

Federal courts have jurisdiction to remedy such "structural" defects in section 186(c)(5) trusts. *See Local 50, Bakery and Confectionery Workers Union* v. *Local 3, Bakery and Confectionery Workers Union*, 733 F.2d 229, 234 (2d Cir. 1984). The Participants cannot prevail, however, if they merely seek to litigate their claim of breach of fiduciary duty under section 186: a simple breach of fiduciary duty in the administration of a pension trust covered by section 186(c)(5) does not amount to a "structural" defect. *See Haley*, 509 F.2d at 1040.

We are not convinced that it is a structural violation of section 186(c)(5) to pay benefits to Brewery Fund beneficiaries who, by virtue of the New York courts' orders, *are* members of the merged Teamsters Fund. The possibility that such payments may affect the fund's solvency is more properly an issue of trust

(Footnote continued)

administration and therefore an ordinary matter of fiduciary duty not litigable under section 186. In light of the Participants' inability to articulate an analysis that would elevate the circumstances of this case to the level of a true "structural" defect under section 186(c)(5), we hold that they have failed to state a claim on this theory.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

ELAINE B. GOLDSMITH
Clerk

Re: Baum vs Nolan

Docket No: 88-7126

Aug 12 1988

Dear Sirs:

The court has handed down a decision in the above-entitled case. The decision of the district court has been

affirmed

A copy of the opinion will be mailed to you. Additional copies of the opinion may be obtained from this office in accordance with §0.17(7) of the rules of this court supplementing the Federal Rules of Appellate Procedure.

Judgment has been entered today and a mandate will issue *ONLY TO THE DISTRICT COURT* in accordance with Rule 41 of the Federal Rules of Appellate Procedure.

Your attention is directed to the provision of Rule 39(c) of the Federal Rules of Appellate Procedure requiring the itemized and verified bill of costs, if any, to be filed with proof of service, within 14 days after entry of judgment.

Very truly yours,

ELAINE B. GOLDSMITH, Clerk
By

/s/ Genevieve Hopstock

Genevieve Hopstock, Deputy Clerk

APPENDIX C

United States District Court

NORTHERN DISTRICT OF NEW YORK

THOMAS J. BAUM et al

JUDGMENT IN A CIVIL CASE

v.

T. EDWARD NOLAN et al Case Number: 86-CV-1128

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

GRANTS defendants' motion for summary judgment dismissing the complaint.

January 15, 1988
Date

J.R.SCULLY
Clerk

P.T. Aton
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THOMAS J. BAUM, ET AL.,

Plaintiffs,

v. 86-CV-1128

T. EDWARD NOLAN, ET AL.,

Defendants.

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McAvoy, Thomas J.,

APPENDIX D

ORDER

This action arises under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1001 *et seq.* The plaintiffs, as participants in the defendant New York State Teamsters Conference Pension and Retirement Fund (Teamsters Fund), claim that the individual defendants, as trustees of the Teamsters Fund, have breached their fiduciary obligations by making payments from Teamsters Fund monies to non-participants in the Teamsters Plan, thereby diluting and dissipating the Plan's assets.

The Teamsters Fund is a multiemployer pension plan within the meaning of ERISA. In 1973, the Teamsters Fund executed a merger agreement with the Brewery Workers Pension Fund (Brewery Fund), a multiemployer plan covering employees of a number of brewery firms. After Rheingold Breweries, Inc., one of the two largest contributing employers in the Brewery Fund, closed its New York City plant, the Teamsters Fund voted to terminate the merger agreement.

In July of 1974, the Brewery Fund brought an action in New York State Supreme Court, seeking a declaration that the merger agreement was binding upon the Teamsters Fund. In 1975, the Supreme Court declared the merger agreement enforceable and ordered the Teamsters Fund to specifically perform that agreement.[1] The Teamsters Fund refused to do so, and in 1977 the Brewery Fund sought a supplemental judgment of enforcement. On April 12, 1977, the Supreme Court held that the Brewery Fund was fully integrated with the Teamsters Fund as of December 1, 1976[2], and enforced its earlier judgment.[3] The Supreme Court ordered the Teamsters Fund to "assume and pay all legal and proper obligations of the Brewery Workers Pension

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[1] *See Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, No. 9997/74 (O'Conner, J. April 11, 1975). Ex. B, "Defendant Trustees' Statement of Undisputed Facts."

[2] *See Brewery Workers Pension Fund v. New York State Teamsters Conference Pension and Retirement Fund*, No. 9997/74 (Calabretta, J. April 12, 1977).

[3] These decisions were affirmed on appeal.

Fund" and "pay all benefits due to: covered members already retired under the Brewery Workers Pension Plan; members in receipt of disability benefits; beneficiaries entitled to receive benefits under the Brewery Workers Pension Plan; and former members with vested rights not yet receiving benefits, but who become entitled to receive benefits in the future."

The Teamsters Fund also sought to terminate the merger in actions before the Internal Revenue Service (IRS) and the United States Tax Court. A condition to the merger agreement was an IRS determination that the merger did not affect the qualified and tax exempt status of the plans. In February of 1985, the IRS concluded that a partial termination had occurred prior to September 30, 1976, but that the partial termination did not cause the Brewery Fund to lose its tax exempt status. The Teamsters Fund trustees have challenged this finding in Tax Court, seeking a declaration that partial termination of the Brewery Fund resulted in its disqualification under the Internal Revenue Code.

The plaintiffs herein, participants of the Teamsters Fund, contend (1) that the Brewery Fund's partial termination for tax purposes caused a portion of the Fund to "spin-off" for ERISA purposes; (2) that even if partial termination of the Brewery Fund under the Internal Revenue Code did not cause a partition under ERISA, brewery workers may receive benefits only to the extent the Brewery Fund was funded on the date of the partial termination;[4] and (3) that the trustees' decision to merge the Funds was a breach of their fiduciary duties and, consequently, payments made pursuant to the merger consitute a breach of the trustees' fiduciary duties. The court has before it now the parties' cross-motions for summary judgment.

In order to qualify for favorable tax treatment, a pension plan must specify that upon partial termination, the rights of affected employees to benefits accrued to the date of the partial

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[4] The plaintiffs abandoned the first and second arguments upon oral presentation of their motion on December 14, 1987. They now rely solely on the third argument outlined.

termination, to the extent funded on such date, are non-forfeitable. 26 U.S.C. section 411(d)(3). Under IRC section 411(d)(3) partial termination ordinarily occurs when an event, such as a discharge of a large number of employees, adversely affects employees' ability to earn vested benefits through continued employment. The court finds, therefore, that a partial termination of the Brewery Fund prior to December 1976 would make accrued benefits of brewery employees non-forfeitable. It would not, however, cause a portion of the Brewery Fund to "spin-off" and go out of existence for ERISA purposes. No partition would occur in these circumstances. *See United Steelworkers v. Harris & Son Steel Co.*, 706 F.2d 1289 (3d Cir. 1983). The court also finds that section 411(d)(3) would not operate to divest brewery employees of their vested benefits to the extent the Brewery Plan was underfunded on the date of a partial termination. Moreover, the court finds that the trustees have not breached their fiduciary duties by complying with the orders issued by the New York State Supreme Court, holding that the merger was effective and directing them to pay benefits to brewery employees. Accordingly, the court hereby

GRANTS defendants' motion for summary judgment dismissing the complaint.

IT IS SO ORDERED.

Date: January 15, 1988

Binghamton, New York

/s/ Thomas J. McAvoy

THOMAS J. McAVOY, U.S.D.J.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-350

Thomas J. Baum, et al.,

Petitioners,

v.

T. Edward Nolan, et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioners,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 12, 1988.

/s/ Thurgood Marshall

Associate Justice of the Supreme Court
of the United States

Dated this 1st
day of November, 1988.

No. 88-979

Supreme Court, U.S.
FILED
FEB 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all other similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *Petitioners*,

v.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DEPERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI and VICTOR OLIVADOTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE," the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint. *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-979

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all other similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, *Petitioners*,

v.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DEPERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI and VICTOR OLIVADOTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE," the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint. *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Trustees of the New York State Teamsters Conference Pension and Retirement Fund ("the Teamsters Fund"), respectfully request that this Court deny the petition for writ of certiorari to the Second Circuit. The Second Circuit's opinion is reported at 853 F.2d 1071 and is included in the Appendix to the Petition for a Writ of Certiorari.[1]

STATEMENT OF THE CASE

Respondents fully adopt the statement of facts from the decision below. We restate the salient points only to remedy significant omissions in Petitioners' statement.

In 1973 the Trustees of the Teamsters Fund and the Trustees of the Brewery Workers Pension Fund ("the Brewery Fund") executed a merger agreement. After one of the largest contributing employers to the Brewery Fund announced that it was closing its covered operations, the Trustees of the Teamsters Fund ("Trustees") refused to proceed with the merger. The Brewery Fund sued, and the Supreme Court of New York ordered the Trustees to proceed with the merger. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, Index No. 9997/74 (O'Connor, J., April 11, 1974), *aff'd*, 49 A.D.2d 744 (1975).

A condition precedent to the merger was a determination by the Internal Revenue Service ("IRS") that the merged plan was a "qualified plan" within the meaning of the Internal Revenue Code ("IRC"). The Trustees argued before the IRS, that the Brewery Fund, and therefore the merged fund, was not qualified. The IRS rejected that position and concluded that the merged plan was qualified. (A.4). The Trustees appealed the IRS determination to the United States Tax Court and ultimately to the Second Circuit. That appeal was dismissed

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[1] References to the Petition and the Appendix will be cited "(P. ——)" and "(A. ——)," respectively.

for lack of jurisdiction. *See Wenzel* v. *Commissioner of Internal Service*, 707 F.2d 694 (2d Cir. 1983).

After the IRS determination, the Brewery Fund returned to court and received a second judgment enforcing the provisions of the merger agreement. *Brewery Workers Pension Fund* v. *New York State Teamsters Conference Pension and Retirement Fund*, Index No. 9997/74 (Calabretta, J., April 12, 1977), *aff'd*, 62 A.D.2d 1046 (1978). That judgment ordered the Trustees to accept the assets of the Brewery Fund, pay all obligations of the Brewery Fund and pay all benefits to Brewery Fund participants. *Id.*

The Trustees also brought suit in the United States District Court for the District of Columbia, arguing that, under the Employee Retirement Income Security Act ("ERISA"), the merger required the approval of the Pension Benefit Guaranty Corporation ("PBGC"). This effort to void the merger also failed when the District of Columbia Circuit affirmed the district court's dismissal of the Trustees' complaint on the ground that "the execution and repudiation of the merger agreement occurred prior to the effective date of ERISA." *New York State Teamsters Conference Pension and Retirement Fund* v. *PBGC*, 591 F.2d 953, 957 (D.C. Cir. 1979).

In a final (continuing) effort to void the merger, the Trustees returned to the IRS, arguing that the closure of certain breweries prior to the effective date of the merger resulted in a "partial termination" of the Brewery Fund within the meaning of section 411(d)(3) of the IRC (26 U.S.C. § 411(d)(3)) and, because Brewery Fund regulations did not adequately address this event, the Brewery Fund lost its tax qualified status before the merger. The IRS agreed that a partial termination had occurred, but concluded that the Brewery Fund nonetheless retained its tax qualified status. (A.5). That decision was appealed to the Tax Court, which upheld the

IRS. An appeal to the Second Circuit is pending. *Loftus* v. *Commissioner* (Docket Nos. 88-4107 and 88-4109) (argued on January 23, 1989).

Against this background and thirteen years after the initial decision upholding the merger, Petitioners brought this action seeking an order unwinding the merger on the theory that by agreeing to the merger, and subsequently failing to dishonor it and violate the orders of the New York Supreme Court, the Trustees breached their fiduciary duty. The United States District Court for the Northern District of New York found that theory untenable and dismissed the complaint. The Second Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. No Special And Important Reasons Exist To Justify Review By This Court

None of the three questions presented for review by Petitioners can be answered in their favor unless this Court concludes that the Trustees were obligated to place themselves in contempt of the New York Supreme Court. Petitioners claim that (1) § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), (2) ERISA, 29 U.S.C. § 1001, *et seq.*, and (3) § 411(d)(3) of the Internal Revenue Code, 26 U.S.C. § 411(d)(3), compelled the Trustees to defy the state court orders and stop paying benefits to those participants in the merged plan who had formerly been participants in the Brewery Fund. We demonstrate in Section II., *infra*, that the Second Circuit correctly rejected each of those contentions. At the outset, however, we emphasize that none of the typical reasons for granting review on writ of certiorari are met.

First, there is no claim that the decision of the Second Circuit conflicts with the decision of another federal court of appeals or the decision of a state court of last resort. No such conflict exists. Instead, as the decisions

involving this same matter illustrate (see, pp. 2 to 4, *supra*), the state courts, the Second Circuit, the District of Columbia Circuit and the IRS all agree that the only permissible course was that followed by the Trustees.

Second, the petition does not present an important question of federal law which should be decided by this Court. Instead, every issue posed by Petitioners may be answered by the fundamental proposition stated by the Second Circuit:

> The Participants cite no authority, and our research discloses none, to support the remarkable notion that fiduciary duty can require deliberate disobedience of a valid judicial order. On the contrary, it is more likely that obedience to such orders *insulates* a fiduciary from claims of breach of duty. *See* III A. Scott, *The Law of Trusts* § 259 at 2217 (3d ed. 1967 & Supp. 1985).

(A.8). That proposition is nothing more than black-letter law. 76 Am. Jur. 2d *Trusts* § 312 at 531 (1975) ("It is the duty of a trustee to comply with orders of a court * * *"); *Id.* at § 285 (if a trustee honors court decree, he cannot be found to have breached his fiduciary duty). *Accord*, 1 *Restatement of Trusts (Second)* § 220 at 514 (1959). Because Petitioners' claims were rejected by application of well-settled legal principles, discretionary review by this Court is not warranted.

II. The Court Below Considered And Correctly Decided The Issues

The Second Circuit examined each of the contentions presented here for review. As we demonstrate, it correctly determined that each was unfounded.

A. There Was No Breach Of Fiduciary Duty Under § 302(c)(5) Of The Labor Management Relations Act Because There Is No Structural Defect

The first issue presented by Petitioners is whether a federal court is authorized "to enforce the fiduciary duties of Trustees of multi-employer pension plans when

a clear breach of such duties created a structurally defective merger between two plans * * *?" That question, however, is not presented on this record because the Second Circuit properly found that its premise—that any breach of duty resulted in a structural defect—is not correct.

> We are not convinced that it is a structural violation of section [302(c)(5)] to pay benefits to Brewery Fund beneficiaries who, by virtue of the New York courts' orders, *are* members of the merged Teamsters Fund. The possibility that such payments may affect the fund's solvency is more properly an issue of trust *administration* and therefore an ordinary matter of fiduciary duty not litigable under section [302].

(A.12-13) (emphasis in original). That conclusion is clearly correct. If anything, it would have been a structural defect if the Trustees would have refused to pay benefits to some of the Fund's participants on the ground that they were once participants in the Brewery Fund. Therefore, this case cannot serve as the vehicle for deciding whether federal courts may remedy a breach of fiduciary duty which results in a structural defect.

Moreover, Petitioners' § 302(c)(5) claim rests solely on the actions of the Trustees in entering into the merger in 1973. (P. 5). Manifestly, that claim is precluded by New York's six-year statute of limitations, which applies to actions brought under § 302(c)(5). *Valle* v. *Joint Plumbing Industry Bd.*, 623 F.2d 196, 202 n.10 (2d Cir. 1980). Accordingly, because Petitioners' claim under § 302(c)(5) is barred by the statute of limitations, there is no occasion to reach the question presented.

B. The Trustees' Conduct At Issue Here Is Not Actionable Under ERISA

Petitioners ask this Court to review the Second Circuit's conclusion that the Trustees' 1973 decision to merge with the Brewery Fund and the consequences of that deci-

sion are actionable under ERISA. Section 514(b)(1) of ERISA unequivocally states that it "shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C. § 1144(b)(1). Accordingly, the Second Circuit held that "the core" of Petitioners' argument (the contention that the Trustees agreed to the 1973 merger without making sufficient inquiry into the financial condition of the Brewery Fund) was not actionable under ERISA.

> It is true that ERISA establishes a statutory standard of care for pension plan fiduciaries. See 29 U.S.C. § 1104 (1982). But even if the alleged failure to inquire fell below that standard, it is not by itself actionable under ERISA because it occurred before January 1, 1975, the date ERISA became effective.

(A-6) (citations omitted).

The Court of Appeals also rejected Petitioners' continuing violation argument, reasoning that:

> The Participants nevertheless contend that the initial breach of fiduciary duty in entering into the merger agreement is still actionable under ERISA because it taints subsequent and current payments of benefits to brewery workers pursuant to the agreement. We are not persuaded, however, that this "continuing breach" analysis brings the Participants' breach of duty claim within the coverage of ERISA. Section 1144(b)(1) expressly provides that ERISA does not supersede state law "with respect to . . . any act or omission which occurred[] before January 1, 1975." Courts have uniformly rejected the theory that pre-ERISA acts are actionable under ERISA if they generate consequences after ERISA's effective date. See *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1501-02 (9th Cir. 1984); *Freeman v. Jacques Orthopaedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654, 656-57 (9th Cir. 1983); *Coward v. Colgate-Palmolive Co.*,

> 686 F.2d 1230, 1233-34 (7th Cir. 1982), *cert. denied*, 460 U.S. 1070 (1983); *Quinn v. Country Club Soda Co.*, 639 F.2d 838, 840-41 (1st Cir. 1981); *Martin v. Bankers Trust Co.*, 565 F.2d 1276, 1278-79 (4th Cir. 1977). Participants' theory "would read . . . section [1144](b)(1) out of the statute," *id.* at 1279; *accord Coward*, 686 F.2d at 1234. Accordingly, we hold that ERISA does not cover the Participants' claims based on either the alleged breach of fiduciary duty in entering into the 1973 merger agreement or the subsequent payment of benefits to brewery workers pursuant to the merged plan.

(A.7). That conclusion is consistent with the holding of the District of Columbia Circuit, which also held that § 514(b)(1) precludes an ERISA-based challenge to the merger. *New York State Teamsters Conference Pension and Retirement Fund* v. *PBGC*, 591 F.2d 953, 957-58 (D.C. Cir. 1979). As demonstrated by the passage quoted above, the Second Circuit's conclusion is also consistent with the holdings of four other federal courts of appeal. Inexplicably, even the cases cited in the petition support that proposition. (*See* P.7). Accordingly, review by this Court would serve no purpose.

C. Partial Termination Under The Tax Code Did Not Reduce The Vested Pension Benefits Of Brewery Workers And Thus The Trustees Did Not Breach Their Fiduciary Duty By Paying Brewery Retirees Benefits

Petitioners' final argument rests on a single phrase in § 411(d)(3) of the IRC, 26 U.S.C. § 411(d)(3), which provides that upon partial termination of a pension plan, benefits of the affected employees are vested "to the extent funded." Petitioners read this language to require a forfeiture of otherwise vested benefits where a pension plan's assets are insufficient to meet vested benefits. According to Petitioners, the effect of § 411(d)(3) is to limit the benefits of Brewery Fund participants to the

assets of that fund in 1976, when a partial termination occurred.

Petitioners' argument is without merit. Acceptance of their position would require the Court to rewrite the statute to provide that upon partial termination benefits of affected employees are vested "[only] to the extent funded." That judicial amendment would defeat the purpose of the statute. Section 411(d)(3) is designed to protect beneficiaries by insuring that an employer may not prevent participants from vesting by terminating them prior to their normal vesting date. *United Steelworkers of America, AFL-CIO* v. *Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3d Cir. 1983). Consistent with this purpose, the IRS (*see* A.9-11), the Third Circuit (*Harris*, 706 F.2d 1298) and the Second Circuit all agree that § 411(d)(3) cannot be used as a device to divest beneficiaries where the plan is not adequately funded.

Even if the construction of § 411(d)(3) were debatable, it does not follow that the "tax event" of partial termination obligated the Trustees to deprive some of the beneficiaries of the Teamsters Fund of their vested benefits. As stated by the Second Circuit:

> We need not delve further into the actuarial minutiae of pension plan funding and taxation, however, to resolve the question of fiduciary duty presented by this appeal. We are convinced that possible underfunding of the merged plan does not place the Trustees under a *fiduciary obligation* to cease payments to Brewery Fund beneficiaries. Indeed, by virtue of the orders of the New York courts, the Brewery Fund has been fully merged into the Teamsters Fund and the Trustees have a fiduciary relationship to the beneficiaries of the Brewery Fund as well as to the Participants. We are not persuaded that under these circumstances ERISA or the Internal Revenue Code compel the Trustees to prefer one group of beneficiaries over the other.

(A.11).

These conclusions are clearly correct and consistent with all other authoritative constructions of § 411(d)(3). Therefore, they do not present an issue meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: February 1, 1989

No. 88-979

(3)

FEB 14 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THOMAS J. BAUM, JOHN J. O'NEIL, STEVEN A. WOLEBEN, DAVID J. MILBACK, BOB HOLMES, RUSSELL SALVO, THOMAS J. SAURO, TIMOTHY M. BISHOP, THADDEUS C. RUTHERFORD, CHARLES B. HEPP, ERNEST C. BREAULT, DONALD I. STOETZEL, BERNHARD C. COLLATZ, JOSEPH R. ARMSTRONG, JAMES C. PERKINS, HAROLD J. LEGNARD, SAM P. BOYIAN, DAVID S. ROSS and JOSEPH READY, on behalf of themselves and all others similarly situated as participants in the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND,

Petitioners,

vs.

T. EDWARD NOLAN, CURTIS GUNDERSEN, RICHARD MULLER, ROCCO F. DE PERNO, VICTOR MOUSSEAU, PAUL E. BUSH, JACK CANZONERI, VICTOR OLIVADOTTI, both individually and as Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND and "JOHN DOE" and "JANE DOE", the names being fictitious but intending to be Trustees of the NEW YORK STATE TEAMSTERS CONFERENCE PENSION AND RETIREMENT FUND, at the times set forth in the Complaint,

Respondents.

PETITIONERS' REPLY BRIEF

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REPLY TO RESPONDENTS' STATEMENT OF THE CASE

Respondents in their brief do not deny that their actions constitute a breach of trust which rebounds to the detriment of the participants in denying to them the benefits $7 million per year would purchase. Their position is excerpted from the decision by the United States Court of Appeals to the effect that obedience to a state court order insulates a fiduciary from claims of breach of duty (Respondents' Memorandum, p. 5). Respondents ignore that in the judicial proceedings resulting in the state court order directing a merger of pension funds and in the litany of litigation commenced by respondents directed toward exculpation from their breach of trust, not once did they plead that the resultant merger was as a result of their lack of fiduciary care or to plead ERISA. As has been cited in the petition for certiorari, this oversight resulted in an unusual comment from the appellate court to the effect that the judgment and order of merger "was entered almost four months after the effective date of ERISA. Certainly defendants [teamster trustees, respondents herein] could have raised the ERISA defenses prior to its entry, but inexplicably failed to do so." Therefore, the trustees hide behind and proffer to the court a judicial sanction for their breach of duty. However, when in control of the litigation, they purposely avoided the very grounds upon which the merger could have been avoided. The respondents now hide behind a court decree wherein they made a conscious choice not to protect their participants but to hide their breach of duty.

RESPONSE TO REASON FOR DENYING THE WRIT

Respondents state that the writ should be denied as "there is no claim that the decision of the Second Circuit conflicts with the decision of another federal court of appeals. . . ." Claiming that no such conflict exists and without a conflict, the Court cannot grant certiorari in a matter totally pre-empted. The

respondents overlook the Ninth Circuit decision in *Sandra Jean Smith v. Retirement Fund Trust of the Plumbing, Heating and Piping Industry of Southern California*, 857 F.2d 587 (9th Cir. 1988) (published January 17, 1989). The Ninth Circuit in determining the statutory standard of act or omission, held ERISA jurisdiction for those acts which are discretionary or interpretative of the plan which took place after ERISA's effective date, notwithstanding its genesis prior to ERISA. The merger of these trust funds was inchoate until after ERISA took effect. The merger took place after ERISA's effective date. ERISA, therefore, on its face would be applicable, or, in the alternative, each discretionary or interpretative act took place after ERISA.

The condition precedent to effectuate the merger was not accomplished until after ERISA. If the Court wishes to use the pre-ERISA date of the merger agreement (the contract date), it must disregard its own statements in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 106 S. Ct. 1018, 89 L.Ed.2d 166 (1986):

> If the regulatory statute is otherwise within the powers of Congress, therefore, its application may not be defeated by private contractual provisions. For the same reason, the fact that legislation disregards or destroys existing contractual rights does not always transform the regulation into an illegal taking.

It is submitted that Congress did not justify pre-existing inchoate agreements as a means for justifying a post-ERISA breach of trust. Nor did Congress justify a continuing breach of trust where the experts retained by the trust advised against the continuation of the breach. The teamster trustees have so far been successful in obfuscating the results, in perpetuating their own breach of trust.

CONCLUSION

For the reasons submitted herein and in the petition for the writ, it is respectfully requested that the petition should be granted.

Dated: February 10, 1989

Respectfully submitted,

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